

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JUSTIN DUPREE GILMORE,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 23 WDA 2013

Appeal from the PCRA Order September 18, 2012
In the Court of Common Pleas of Erie County
Criminal Division at No.: CP-25-CR-0000767-2011

BEFORE: SHOGAN, J., LAZARUS, J., and PLATT, J.*

MEMORANDUM BY PLATT, J.

Filed: May 29, 2013

Appellant, Justin Dupree Gilmore, appeals *pro se* from the order dismissing his first petition filed pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

On August 4, 2011, following a bench trial, the trial court found Appellant guilty of one count each of aggravated assault, simple assault, harassment, and disorderly conduct.¹ These charges resulted from Appellant's assault on a bouncer at a bar in March 2011, during which Appellant hit the victim over the head with a glass bottle. On September 29,

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S.A. § 2702(a)(4), 18 Pa.C.S.A. § 2701(a)(1), 18 Pa.C.S.A. § 2709(a)(1), and 18 Pa.C.S.A. § 5503(a)(4), respectively.

2011, Appellant failed to appear at his sentencing hearing, and the court sentenced him *in absentia* to a term of no less than three and a half nor more than ten years' incarceration.² Appellant did not file a direct appeal.

On June 8, 2012, Appellant timely filed a *pro se* PCRA petition. Appointed counsel filed a **Turner/Finley**³ no-merit letter and petition to withdraw as counsel on August 13, 2012. On August 20, 2012, the court granted counsel's petition to withdraw, and issued an opinion and notice of its intent to dismiss Appellant's PCRA petition without a hearing.⁴ On September 18, 2012, the court dismissed Appellant's PCRA petition. This timely appeal followed.⁵

Appellant raises four issues for our review, three of which relate to his sentence *in absentia*:

² The trial court issued a warrant for Appellant's arrest due to his failure to appear at the hearing.

³ **Commonwealth v. Turner**, 544 A.2d 927 (Pa. 1988); **Commonwealth v. Finley**, 550 A.2d 213 (Pa. Super. 1988) (*en banc*).

⁴ **See** Pa.R.Crim.P. 907(1) (providing that after giving proper notice of its intent to dismiss a PCRA petition, a court may dismiss the petition without a hearing if, based on the record and the petition, there are no genuine issues of material fact, no purpose would be served by further proceedings, and the petitioner is not entitled to PCRA relief).

⁵ The PCRA court did not order Appellant to file a concise statement of errors complained of on appeal. **See** Pa.R.A.P. 1925(b). The court filed a Rule 1925(a) opinion on October 26, 2012, in which it adopted the reasoning set forth in its August 20, 2012 opinion. **See** Pa.R.A.P. 1925(a).

1. [Was Appellant] deprived of effective [trial] counsel, when counsel allowed the court to sentence [Appellant] *in absentia*[?]
2. [Was Appellant] deprived of effective counsel, when [trial] counsel did not investigate and present mitigating factors to the sentencing court[?]
3. [Was Appellant] deprived of effective counsel, when [PCRA] counsel[] failed to present [Appellant's] claims of ineffective counsel when trial counsel allowed the court to sentence [Appellant] *in absentia*[?]
4. [Did] the trial court erred [sic] when sentencing [Appellant] *in absentia*, without holding a hearing to determine if [Appellant] was absent without good cause[?]

(Appellant's Brief, at 4).⁶

Our standard of review for an order denying PCRA relief is well-settled:

This Court's standard of review regarding a PCRA court's order is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error. Great deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record. Moreover, a PCRA court may decline to hold a hearing on the petition if the PCRA court determines that a petitioner's claim is patently frivolous and is without a trace of support in either the record or from other evidence.

Commonwealth v. Carter, 21 A.3d 680, 682 (Pa. Super. 2011) (citations and quotation marks omitted).

⁶ Appellant's handwritten brief is not numbered, and is instead labeled page "C", "D", etc. **See** Pa.R.A.P. 2173 (providing that pages of briefs "shall be numbered separately in Arabic figures[.]"). We have numbered the pages of his brief for ease of reference.

As an initial matter, we observe that none of the issues Appellant discusses in his brief were raised in his *pro se* PCRA petition.⁷ Because Appellant raises these issues for the first time on appeal, the claims are waived. **See Commonwealth v. Rainey**, 928 A.2d 215, 226 (Pa. 2007) (concluding that issues not raised by appellant on direct appeal or in PCRA petition were waived and not reviewable); **see also** 42 Pa.C.S.A. § 9544(b); Pa.R.A.P. 302(a) (“Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.”); **Commonwealth v. Williams**, 899 A.2d 1060, 1066 n. 5 (Pa. 2006) (waiving issues appellant did not raise in PCRA petition). In making this determination, we are mindful that “although this Court is willing to construe liberally materials

⁷ In his PCRA petition, Appellant averred eligibility for relief based on an unspecified constitutional violation and several claims of ineffective assistance of trial counsel: specifically, that counsel withheld circumstantial evidence from Appellant; that counsel failed to file motions or a direct appeal as requested; and that counsel “[d]id [n]ot explain the true terms of the proceedings in a manner [Appellant] could understand and make proper decisions.” (Appellant’s PCRA petition, 6/08/12, at unnumbered pages 3-4). In a letter directed to PCRA counsel dated July 11, 2012, Appellant elaborated on his ineffective assistance of counsel claims, asserting that counsel: was not prepared for trial; did not review the case with him prior to trial; failed to file a motion to suppress evidence; failed to obtain a letter from the Commonwealth that the Commonwealth attempted to use as evidence against him at trial; and failed to ask witnesses certain questions during trial. (**See** Appellant’s Letter, 7/11/12, at 1). Appellant also indicated, “[a]ll [I] want is my plea back they offer[e]d[.]” (**Id.**). Appellant made no mention of his claims relating to his sentence *in absentia* or trial counsel’s alleged failure to investigate mitigating factors in either his PCRA petition or subsequent letter to PCRA counsel.

filed by a *pro se* litigant, *pro se* status generally confers no special benefit upon an appellant. Accordingly, a *pro se* litigant must comply with the procedural rules set forth in the Pennsylvania Rules of the Court.” ***Commonwealth v. Lyons***, 833 A.2d 245, 251-52 (Pa. Super. 2003), *appeal denied*, 879 A.2d 782 (Pa. 2005) (citations omitted).

Further, we note that, even if we did not find waiver, Appellant’s central claim that trial counsel was ineffective in allowing the court to sentence him *in absentia* lacks merit.⁸ While the Sixth Amendment to the United States Constitution, “Article I, § 9 of the Pennsylvania Constitution and Pennsylvania Rule of Criminal Procedure 602 guarantee the right of an accused to be present in the courtroom at every stage of a criminal trial[,]” ***Commonwealth v. Hunsberger***, 58 A.3d 32, 37-38 (Pa. 2012) (citations and footnote omitted) “this right may be waived either expressly or implicitly by a defendant’s actions.” ***Commonwealth v. Bond***, 693 A.2d 220, 223

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To prevail on an ineffectiveness claim, a petitioner must plead and prove, by a preponderance of the evidence, three elements: (1) the underlying legal claim has arguable merit; (2) counsel had no reasonable basis for his or her action or inaction; and (3) the petitioner suffered prejudice because of counsel’s action or inaction.

Commonwealth v. Hunsberger, 58 A.3d 32, 36-37 (Pa. 2012) (citation omitted). “Counsel cannot be deemed ineffective for failing to raise a meritless claim.” ***Commonwealth v. Sepulveda***, 55 A.3d 1108, 1118 (Pa. 2012) (citation omitted).

(Pa. Super. 1997), *appeal denied*, 749 A.2d 465 (Pa. 1999) (citation and footnote omitted). Rule 602 provides that “[t]he defendant shall be present at every stage of the trial including . . . the imposition of sentence[.] . . . The defendant’s **absence without cause shall not preclude proceeding with . . . the imposition of sentence.**” Pa.R.Crim.P. 602(A) (emphasis added); *see also Commonwealth v. Rodriguez*, 670 A.2d 678, 679 (Pa. Super. 1996), *appeal denied*, 682 A.2d 309 (Pa. 1996) (holding that where a defendant absents himself voluntarily, necessitating sentencing *in absentia*, he waives right to challenge sentence on basis that it was imposed in his absence).

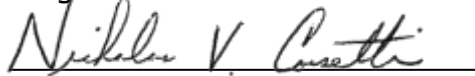
Here, at the conclusion of Appellant’s bench trial, the trial court specifically advised Appellant that “[s]entencing will be set for September 29th at 9:00 before this [c]ourt.” (N.T. Trial, 8/04/11, at 61). Appellant also signed an acknowledgment confirming that he had received written notice of the sentencing date. (*See id.*; *see also* N.T. Sentencing Hearing, 9/29/11, at 5, 9-10). At the sentencing hearing, after Appellant failed to appear, the Commonwealth indicated that he did not report back after the verdict, and defense counsel stated that he had not been in contact with Appellant for approximately three weeks. (*See* N.T. Sentencing Hearing, 9/29/11, at 4-5). The court determined that, because Appellant had not contacted his attorney or the court, despite receiving express oral and written notification of the sentencing date, he had “voluntarily and knowingly chosen not to appear[.]” (*Id.* at 5). Following the hearing, Appellant

remained a fugitive for a period of more than six months. (**See** Trial Court Opinion, 8/20/12, at unnumbered page 2).

Because Appellant's voluntary decision not to appear at the hearing necessitated the sentence *in absentia*, these challenges he raises to the sentence based on its imposition in his absence are meritless. **See** Pa.R.Crim.P. 602(A); **Rodriguez, supra** at 679. Accordingly, counsel cannot be deemed ineffective for declining to raise this issue, and Appellant's central claim on appeal would fail even if it were not waived. **See Hunsberger, supra** at 36-37; **Sepulveda, supra** at 1118.

Order affirmed.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casatta", is written over a horizontal line.

Deputy Prothonotary

Date: May 29, 2013